

**List of Subjects in 47 CFR Part 8**

Cable television, Common carriers, Communications common carriers, Reporting and recordkeeping requirements, Satellites, Telecommunications, Telephone, Radio. Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

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**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 204, 232, and 252**

[Docket DARS-2022-0029]

RIN 0750-AJ46

**Defense Federal Acquisition Regulation Supplement: Payment Instructions (DFARS Case 2017-D036)**

**AGENCY:** Defense Acquisition Regulation System, Department of Defense (DoD)

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide payment instructions for certain contracts based on the type of item acquired and the type of payment.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before February 14, 2023, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments in response to DFARS Case 2017-D036 by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for “DFARS Case 2017-D036”. Select “Comment Now” and follow the instructions provided to submit a comment. Please include “DFARS Case 2017-D036” on any attached document.
- *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2017-D036 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulation.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Mr. David E. Johnson, telephone 202-913-5764.

**SUPPLEMENTARY INFORMATION:****I. Background**

DoD is proposing to amend the DFARS to provide payment instructions for certain contracts based on the type of payment and item acquired. The proposed rule would require separate progress payment requests in order to segregate foreign military sales (FMS) and U.S. line items in progress payment requests. In addition, the proposed rule provides procedures for structuring progress payment requests for contracts with multiple production lots.

The proposed rule consists of clarifications that require no additional effort by large or small entities. The rule provides contracting officers and contractors clearer instruction on information to include in payment instructions and payment requests for multiple lot purchases and combined FMS/U.S. acquisitions.

**II. Discussion and Analysis**

A review of Procurement Data Standard validation results has shown that contracting officers are not consistently inserting required payment instructions into contracts. Further, the Defense Finance and Accounting Service (DFAS) reported that the payment instructions, if inserted, are often not appropriate for the given contract. Upon review, DoD found that the appropriate accounting treatment for payments can be determined by the type of payment and item acquired. In addition, DoD recognized the need to establish procedures for structuring progress payment requests for contracts with multiple production lots.

DFARS 204.7109, Contract clauses, and the clause at DFARS 252.204-7006, Billing Instructions, are being amended to change the applicability of contractor cost vouchers to cost-reimbursable, time-and-material, and labor-hour contracts. The clause applicability was revised to align with payment instruction procedures provided in DFARS Procedures, Guidance, and Information 204.7108(b)(3). DFARS 252.204-7006, Billing Instructions, clause title is also revised to “Billing Instructions-Cost Vouchers”.

The following revisions have been made to simplify the contracting officer’s instructions to the payment office for progress payment funding allocations: DFARS 232.502-4-70, Additional clauses, and the new clause at 252.232-70XX, Progress Payments-Multiple Lots, provide the procedures for submitting progress payments for contracts with multiple production lots. In addition, DFARS 252.232-7002, Progress Payments for Foreign Military

Sales Acquisitions, is revised to clarify the requirement for submitting separate progress payment requests for FMS and U.S. contract line items.

**III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Services, and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items**

The proposed rule clarifies payment instructions for certain contracts based on the type of item acquired and the type of payment by amending DFARS 252.204-7006 and 252.232-7002, and adding a new clause at 252.232-70XX. DoD plans to apply all three clauses to solicitations and contracts at or below the SAT. This rule does not apply to commercial services or commercial products, including COTS items.

**IV. Expected Impact of the Rule**

Currently, payment instructions are being entered manually into DoD’s payment systems due to a lack of clarity in the DFARS with regard to payment instructions. This proposed rule clarifies the payment instruction language in the DFARS. The clarifications in this proposed rule will reduce data errors and inoperability problems throughout DoD’s business processes created by manual entry of payment instructions in the payment systems, as well as reducing the cost of data entry.

**V. Executive Order 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

**VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United

States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

### VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this proposed rule is to provide clarifications on payment instructions for certain contracts based on the type of item acquired and the type of payment. DoD has found that the payment instructions often are not inserted when required and that payment instructions, if inserted, are often not appropriate for the contracts in question. An analysis of the issue showed that the appropriate accounting treatment for payments can be derived from the type of item acquired and the type of payment. In addition, the analysis highlighted the need to establish procedures for structuring progress payment requests for contracts with multiple production lots. The clarifications in this proposed rule will promote consistency with generally accepted accounting principles and reduce data errors created by manual entry of payment instructions in the payment systems.

The objective of the proposed rule is to clarify payment instructions. The proposed rule includes clarifications to procedures for billing instructions when submitting cost vouchers and progress payment requests. The proposed rule clarifies instructions to contractors in the clauses at DFARS 252.204–7006, Billing Instructions, and 252.232–7002, Progress Payments for Foreign Military Sales Acquisitions. The proposed rule also includes a new contract clause at 252.232–70XX, Progress Payments—Multiple Lots. The legal basis for the rule is 41 U.S.C. 1707.

The proposed rule will apply to all small entities that will be awarded cost-reimbursement, time-and-material, or labor-hour contracts. However, the proposed rule requires negligible additional effort by contractors, including small entities, and it simply clarifies the identification and use of payment information elements in payment requests. According to data from the Federal Procurement Data System for fiscal years 2017 through 2019, approximately 446,845 cost-reimbursement, time-and-material, and

labor-hour contracts (60 percent of all awards) are awarded to 29,022 small businesses (60 percent of all awardees) each year. This proposed rule also applies to contracts that use multiple accounting classifications or that involve progress payments for multiple production lots. DoD cannot accurately quantify the number of contracts subject to the multiple-lot progress payments clause, but such contracts are likely few in number.

The rule does not contain any new reporting, recordkeeping, or other compliance requirements for small entities.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known, significant, alternative approaches to the proposed rule that would meet the objectives of the rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2017–D036), in correspondence.

### VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule regarding new DFARS clause 252.232–70XX, Progress Payments—Multiple Lots. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under Office of Management and Budget (OMB) Control Number 9000–0010, titled Progress Payments, SF 1443.

The rule affects information collection requirements in DFARS 252.232–7002, Progress Payments for Foreign Military Sales Acquisitions, currently approved under OMB Control Number 0704–0321, titled DFARS Part 232, Contract Financing, and the Clause at 252.232–7002, Progress Payments for Foreign Military Sales Acquisition. The impact, however, is negligible because the changed reporting requirement is not anticipated to increase the estimate of total burden hours; rather the requirement to submit separate payment requests by rate is merely replaced by a requirement to submit separate payment requests for FMS and U.S. line items in the contract.

### List of Subjects in 48 CFR Parts 204, 232, and 252

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 204, 232, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 232, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

### PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

■ 2. Amend section 204.7109 by revising paragraph (b) to read as follows:

#### 204.7109 Contract clauses.

\* \* \* \* \*

(b) Use the clause at 252.204–7006, Billing Instructions—Cost Vouchers, in solicitations and contracts when a cost-reimbursement contract, a time-and-materials contract, or a labor-hour contract is contemplated.

### PART 232—CONTRACT FINANCING

■ 3. Amend section 232.502–4–70 by adding paragraph (c).

The addition reads as follows:

#### 232.502–4–70 Additional clauses.

\* \* \* \* \*

(c) Use the clause at 252.232–70XX, Progress Payments—Multiple Lots, to authorize separate progress payment requests for multiple lots.

### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 252.204–7006—

■ a. By revising the section heading, clause title, and clause date; and

■ b. In the clause introductory text, removing “payment” and adding “payment using a cost voucher” in its place.

The revisions read as follows:

#### 252.204–7006 Billing Instructions—Cost Vouchers.

\* \* \* \* \*

#### Billing Instructions—Cost Vouchers (Date)

\* \* \* \* \*

■ 5. Revise section 252.232–7002 to read as follows:

#### 252.232–7002 Progress Payments for Foreign Military Sales Acquisitions.

As prescribed in 232.502–4–70(a), use the following clause:

**Progress Payments for Foreign Military Sales Acquisitions (Date)**

If this contract includes foreign military sales (FMS) requirements, the Contractor shall—

(a) Submit a separate progress payment request for the FMS and U.S. line items in the contract;

(b) Submit a supporting schedule showing the amount of each request distributed to each country's requirements;

(c) Identify in each progress payment request the contract requirements to which it applies (*i.e.*, FMS or U.S.);

(d) Calculate each request on the basis of the prices, costs (including costs to complete), subcontractor progress payments, and progress payment liquidations of the contract requirements to which it applies; and

(e) Distribute costs among the countries in a manner acceptable to the Administrative Contracting Officer.

(End of clause)

■ 6. Add section 252.232–70XX to read as follows:

**252.232–70XX Progress Payments—Multiple Lots.**

As prescribed in 232.502–4–70(c), use the following clause:

**Progress Payments—Multiple Lots (Date)**

(a) *Definitions.* As used in this clause—

*Lot* means one or more fixed price deliverable line items or deliverable subline items representing a single, severable group where the sum of the costs for each group is segregated and a single progress payment rate is used.

*Multiple lots* means more than one lot on a single contract where progress payment proration is performed on a lot-wide, versus contract-wide, basis.

(b) When submitting progress payment requests under the billing instructions in Federal Acquisition Regulation (FAR) clause 52.232–16, Progress Payments, or Defense Federal Acquisition Regulation Supplement clause 252.232–7002, Progress Payments for Foreign Military Sales Acquisitions, of this contract, the Contractor shall—

(1) Submit separate progress payment requests for each lot identified in the contract;

(2) Identify the contract price for the lot as the sum of all fixed-priced line items identified to the lot, in accordance with FAR 32.501–3;

(3) Identify the lot on each progress payment request to which the request applies;

(4) Calculate each request on the basis of the price, costs (including the cost to complete), subcontractor progress payments, and progress payment liquidations of the lot to which it applies; and

(5) Distribute costs among lots in a manner acceptable to the Administrative Contracting Officer.

(c) Submit a separate progress payment request for U.S. and FMS requirements in accordance with the clause 252.232–7002, Progress Payments for Foreign Military Sales Acquisitions, of this contract.

(End of clause)

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**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Part 252**

[Docket DARS–2022–0030]

RIN 0750–AL67

**Defense Federal Acquisition Regulation Supplement: Update of Challenge Period for Validation of Asserted Restrictions on Technical Data and Computer Software (DFARS Case 2022–D016)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2012, which addresses the validation of proprietary data restrictions. In addition to the request for written comments on this advance notice of proposed rulemaking, DoD will hold a public meeting to hear the views of interested parties.

**DATES:** Comments on the advance notice of proposed rulemaking should be submitted in writing to the address shown below on or before February 14, 2023, to be considered in the formation of a proposed rule.

**Public Meeting:** A virtual public meeting will be held on January 26, 2023, from 1:00 p.m. to 5:00 p.m., Eastern time. The public meeting will end at the stated time, or when the discussion ends, whichever comes first.

**Registration:** Registration to attend the public meeting must be received no later than close of business on January 19, 2023. Information on how to register for the public meeting may be found under the **SUPPLEMENTARY INFORMATION** section of this notice.

**ADDRESSES:**

**Public Meeting:** A virtual public meeting will be held using Zoom video conferencing software.

**Submission of Comments:** Submit comments identified by DFARS Case 2022–D016, using any of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for

“DFARS Case 2022–D016.” Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2022–D016” on any attached documents.

○ *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2022–D016 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** David E. Johnson, telephone 202–913–5764.

**SUPPLEMENTARY INFORMATION:****I. Background**

DoD is seeking information from experts and interested parties in the Government and the private sector that will assist in the development of a revision to the DFARS to implement section 815(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Pub. L. 112–81). This statute applies to DoD only; it does not impact other Federal agencies. Section 815(b) amended 10 U.S.C. 2321 (redesignated as 10 U.S.C. 3782) by increasing the validation period for asserted restrictions from three years to six years. Section 815(b) also amended 10 U.S.C. 2321 to provide an exception to the prescribed time limit for validation of asserted restrictions if the technical data involved are the subject of a fraudulently asserted use or release restriction.

DoD previously published proposed DFARS revisions to implement these statutory revisions as part of DFARS Case 2012–D022 on June 16, 2016, at 81 FR 39481. That case was suspended during the pendency of the Government-Industry Advisory Panel on Technical Data Rights (the 813 Panel) pursuant to section 813 of the NDAA for FY 2016. As part of the resumption and reorganization of the DFARS data rights cases after the conclusion of the 813 Panel, this statutory subject matter has been broken out in this separate case due to the distinct subject matter and limited nature of the statutory revisions.

**II. Public Meeting**

DoD is interested in continuing a dialogue with experts and interested parties in the Government and the private sector regarding amending the DFARS to implement section 815(b) of the NDAA for FY 2012.